

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 03 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ROBERT KENNY,

Petitioner - Appellant,

v.

RONALD SMITH, Field Director; et al.,

Respondents - Appellees.

No. 04-57049

D.C. No. CV-04-01657-JTM/BLM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted September 2, 2005^{**}
Pasadena, California

Before: CANBY, KOZINSKI, and RAWLINSON, Circuit Judges.

1. Robert Kenny, a native and citizen of Ireland, appeals the district court's order dismissing his 28 U.S.C. § 2241 habeas corpus petition, which challenged the "propriety" of the order of removal. Pursuant to section 106(c) of the REAL

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 311 (2005), we treat Kenny's appeal as a petition for review. *See Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1052-53 (9th Cir. 2005).

However, as a condition of his participation in the Visa Waiver Program, Kenny waived his right to challenge his removal, and we hold him to that waiver. *See* 8 U.S.C. § 1187(b)(2); *see also Handa v. Clark*, 401 F.3d 1129, 1135-36 (9th Cir. 2005).

2. Kenny also challenges the Department of Homeland Security's failure to adjudicate his application for adjustment of status prior to his deportation.

Although not a direct contest of removal, this is a "cause or claim . . . arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders," review of which is explicitly barred by 8 U.S.C. § 1252(g). We lack jurisdiction over this claim.

3. We retain jurisdiction to review Kenny's due process and equal protection claims. *See* 8 U.S.C. § 1252(a)(2)(D); *see also Martinez-Rosas v. Gonzales*, 424 F.3d 926, 930 (9th Cir. 2005). However, Kenny's asserted due process and equal

protection claims do not allege “a colorable constitutional violation,” requiring dismissal. *See id.*; *see also* 8 U.S.C. § 1252(a)(2)(B)(i).

PETITION DISMISSED in part, **DENIED** in part.